

U.S. Department of Labor

Office of Administrative Law Judges
50 Fremont Street
Suite 2100
San Francisco, CA 94105

(415) 744-6577
(415) 744-6569 (FAX)



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OWCP m: 15-41668

In the Matter of:

Scott Becker,
Claimant,

vs.

Dillingham/Manson Joint Venture,
Employer,

and

Eagle Pacific Insurance Company,
Insurance Carrier.

Appearances:

John R. Hillsman, Esq.
For Claimant

Richard C. Wootton, Esq.
Mitchell S. Griffin, Esq.
For Employer/Carrier

Before:

William Dorsey
Administrative Law Judge

Decision and Order

I. INTRODUCTION

Claimant, Scott Becker, is now 38 years old. Dillingham/Manson Joint Venture¹ employed him as a carpenter in constructing the Admiral Cleary Bridge in Pearl Harbor, Hawaii. An elevated work platform he stood on collapsed as he was removing forms during his work, and he fell onto a barge before he hit the water. He suffered multiple fractures of the left foot, sprained his first, left, metatarsophalangeal joint and claims back injuries from that fall. He has reached maximum medical improvement for the foot injuries, after two surgeries. The compensation insurance carrier for his employer was Eagle Pacific Insurance Company. Claimant brought this claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 et seq. ("LHWCA" or "Act").

MRI scans of Mr. Becker's lumbar spine taken after the accident revealed a pars defect at the L4-5 level, a Grade I spondylolisthesis at L4-5, a subluxation of L4 on L5, marked bilateral foraminal stenosis at L4-5, a disc protrusion at L4-5, and a mild degeneration of L5-S1. The parties agree that these lumbar conditions existed before the fall, and in some cases were congenital; they disagree about whether the fall caused back injuries. Claimant contends that the accident aggravated, accelerated and contributed to conditions which caused him to have back surgery on January 4, 2001, which would mean that he suffered an unscheduled back injury within the meaning of § 8(c)(21) of the Act when he fell. Respondents argue that the lumbar condition is not related to his employment, and that he has only suffered a scheduled injury to his left foot under § 8(c)(2) of the Act.

Originally the case was assigned to Administrative Law Judge Robert D. Kaplan in Camden, New Jersey. The matter was to be decided on a written record, and the main issue then was whether Claimant was entitled to receive care for his back condition under the Act. After he reviewed the parties' filings, Judge Kaplan issued an Order to Show Cause why the case should not be remanded to the District Director, Office of Workers' Compensation Programs, so the District Director could consider the issue of whether Claimant had suffered any permanent disability, and loss of wage earning capacity. After receiving the parties' briefings on the matter, Judge Kaplan issued an Order of Remand to the District Director for consideration of those issues on May 8, 2001. After completion of those proceedings, the case was assigned to me.

During a pre-trial conference on August 28, 2001, the parties waived the right to call live witnesses and agreed to submit the case to me entirely on a written record.

¹The Employer will be referred to as "Dillingham" or "Employer," the insurer as "EPIC" or "Carrier," and the Employer and insurer jointly as "Employer/Carrier" or "Respondents".

On September 27, 2001, I heard argument to clarify the issues. Pursuant to my October 1, 2001 order, the parties submitted supplemental briefs on October 5, 2001.

II. STIPULATIONS

On September 7, 2001, the parties submitted a Joint Prehearing Statement in which they stipulated to the following:

1. Claimant was injured on April 8, 1997, in Pearl Harbor, Hawaii, during the construction of the Admiral Cleary Bridge between Oahu and Ford Island, when an elevated work platform spanning bridge piers 27 and 28 collapsed, and he fell onto a barge.
2. Claimant suffered multiple left foot fractures (including a fractured tarsal navicular, a fractured second metatarsal, and a comminuted fracture of the sesamoid bone) and sprained his first, left, metatarso-phalangeal joint during his April 8, 1997 accident.
3. Post-accident MRI scans of claimant's lumbar spine show that he has a pars defect at the L4-5 level, a Grade I spondylolisthesis at L4-5, a subluxation of L4 on L5, marked bilateral L4-5 foraminal stenosis, a disc protrusion at L4-5, and mild degeneration of L5-S1. The parties agree that in some instances these lumbar conditions existed before the fall. Claimant brought a claim under the Act, in which he contends that his April 8, 1997 accident aggravated, accelerated, and contributed to the development of the conditions shown on the MRI scans. He alternatively contends that his employment on the Admiral Cleary Bridge Project exposed him to injurious stimuli and day to day micro-trauma which advanced the degeneration of his spine. Claimant therefore maintains that he has suffered an unscheduled injury within the meaning of § 8(c)(21). Respondents dispute these contentions, maintaining that Claimant's lumbar problems are not related in any way to his employment. They maintain that he has suffered only a scheduled injury to the left leg under § 8(c)(4)².
4. Claimant was substantially employed and ultimately injured upon the actual navigable waters of the United States. *Director, OWCP v. Perini North River Assoc.*, 459 U.S. 297, 324 (1982), and the parties are covered by the Act.

²As Claimant acknowledges in his Proposed Decision and Order, the stipulations found in the Joint Prehearing Statement signed by both parties mistakenly identifies Claimant's scheduled injury as a left leg injury under § 8(c)(2) when, in fact, it should be a left foot injury under § 8(c)(4). Stipulations normally bind the parties under 29 C.F.R. § 18.51, but this mistake should be corrected. Respondents also identified the injury as a § 8(c)(4) foot injury in their Proposed Decision and Order, so they too acknowledge the mistaken classification in the stipulation.

5. An employer-employee relationship existed between Dillingham and Claimant at the time of his injury.
6. Claimant's fall, and his resulting left foot injuries, arose out of and in the course of his employment with Dillingham. Respondents deny that Claimant's unscheduled lumbar problems are employment-related.
7. Claimant gave timely notification of the injury to Employer pursuant to § 12 of the Act on April 8, 1997, and to the Secretary of Labor on April 9, 1997.
8. Respondents timely filed a notice of controversion on November 2, 1999.
9. The parties held an informal conference on November 16, 1999.
10. Disability has resulted from the injury.
11. Medical benefits under § 7 of the Act were paid. Respondents have furnished all medical, surgical and other treatment required for Claimant's foot injury. They have denied authorization for the on-going treatment of claimant's lumbar problems.
12. Medical benefits in the total combined amount of \$31,936 have been paid to the following medical providers:
 - Orthopedic Associates of Hawaii, Inc. (Calvin Oishi, M.D.)
 - Orthopedic Service Company LLP (Alan Oki, M.D.)
 - Kapi'olani Medical Center
 - Sports Medicine Hawaii, Ltd. (Patrick Ariki, P.T.)
 - Honolulu Orthopedic Supply
 - Orthopedic Rehabilitation Specialists, Inc.
 - Queens Medical Center
13. Respondents paid Claimant temporary total disability compensation for 193 weeks at \$444.82 per week from April 8, 1997 to December 14, 2000.
14. Claimant has suffered a permanent disability.
15. Claimant's average weekly wage ("AWW") was \$667.23.

16. Whether Claimant has attained maximum medical improvement is disputed. The parties agree that Claimant's foot injuries reached maximum medical improvement on or about June 2, 1998. The parties likewise agree, first, that he underwent back surgery for his lumbar problems on January 4, 2001, and second, that he has not yet reached maximum medical improvement from that surgery. The parties finally agree that, if his employment with Dillingham aggravated, accelerated or otherwise contributed to the development of those lumbar problems, he is currently temporarily and totally disabled by reason of those problems.
17. The treating physician has concluded, and the parties agree, that Claimant's left foot injuries have permanently disabled him from returning to his regular employment.

Under 29 C.F.R. § 18.51,³ I accept these stipulations into evidence, as corrected, and they are binding upon the parties.

III. ISSUES FOR ADJUDICATION

The issues for adjudication are:

1. Whether Claimant's employment aggravated, accelerated or otherwise contributed to the development of Claimant's pre-existing lumbar problems;
2. Whether, according to the testimony of Robert Smith, M.D., Claimant's foot injury and subsequent inactivity and convalescence substantially deconditioned Claimant's lumbar spine, so that his back condition became symptomatic, leading to his back surgery;
3. If Claimant's employment did aggravate, accelerate or otherwise contribute to making his pre-existing lumbar problems symptomatic, whether Respondents are required to furnish medical treatment for the lumbar condition under § 7 of the Act;
4. Whether Respondents have met their burden of demonstrating suitable alternative employment was available to Claimant when they terminated his benefits on December 14, 2000;

³This section states in pertinent part:

The parties may by stipulation in writing at any stage of the proceeding, or orally made at hearing, agree upon any pertinent facts in the proceeding. . . . Stipulations may be received in evidence at a hearing or prior thereto, and when received in evidence, shall be binding on the parties thereto.

5. Whether Claimant has suffered a scheduled loss of use of the left foot under § 8(c)(4) of the Act;
6. Whether Claimant is entitled to recover interest under 28 U.S.C. § 1961 on any unpaid benefits, costs and attorney's fees under § 28 of the Act, and if so, in what amount;
7. Whether Respondents are entitled to a credit toward any further disability benefits claimed by Mr. Becker, based on the \$58,907.51 they already paid to him as compensation?

IV. FINDINGS OF FACT AND CONCLUSIONS LAW

Based on the record submitted, I make these findings and conclusions in addition to the parties' stipulations:

A. Aggravation and Acceleration of Claimant's Lumbar Problems

"The aggravation rule is a doctrine of general workers' compensation law which provides that, where an employment injury aggravates, accelerates, or combines with a pre-existing impairment to produce a disability greater than that which would have resulted from the employment injury alone, the entire resulting disability is compensable." *Port of Portland v. Director, OWCP*, 932 F.2d 836, 839 (9th Cir. 1990) (relying on *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812, 814-15 (9th Cir. 1966)). This rule provides a single, complete recovery to the employee. *Id.* (citing *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 517 (5th Cir. 1986)). To determine whether the rule applies in this case, I must address several issues.

1. Weighing medical opinions

The parties disagree about the degree of deference that I should afford to the opinions of doctors regarding the legal cause of Claimant's injuries. Claimant believes that under *Amos v. Director, OWCP*, 153 F.3d 1051, 1053 (9th Cir. 1998), I must afford special weight to the opinion of Claimant's treating spinal specialist and surgeon, Dr. Gregory Chow.⁴ Claimant's Post Hearing Brief at 3.

⁴Calvin Oishi, M.D. (Claimant's orthopaedics specialist) and Alan Oki, M.D. (Claimant's pain management consultant) ultimately deferred to Dr. Chow's superior knowledge of the spine, and gave no opinions on causation, see Claimant's Amended Proposed Decision and Order at p. 11. Dr. Chow's testimony represents Claimant's primary theory of causation, which I am to evaluate against Respondents' theory, articulated by Robert Smith, M.D.

Respondents contend that *Amos* deference is owed when the issue is one of medical treatment, not the issue of legal causation of Mr. Becker's injury or condition. Dr. Chow examined and cared for Mr. Becker only after his injury; he gained no special insight into the cause of the condition by virtue of some special relationship with Claimant. They believe Dr. Chow is in no better position to give an opinion on causation of the back condition than is Respondents' examining physician, Dr. Smith. Respondents claim support for their argument in decisions such as *Magallanes, supra*; *Barbosa v. Bay Decking Co., Inc.*, 34 BRBS 404 (ALJ 2000); and *Denney v. San Francisco Drydock Co.*, 33 BRBS 192 (ALJ 1999), all of which conclude that a treating physician's opinion about topics other than treatment is not always controlling.

In *Amos*, the Ninth Circuit gave controlling weight to the treating physician's opinion about whether his patient should undergo shoulder surgery, because that physician "is employed to cure and has a greater opportunity to know and observe the patient as an individual." *Id.* (quoting *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989)). After being struck in the face by a steel bar, Amos had fallen over a railroad tie at work and injured his shoulder. The employer's insurance company and its examiner believed surgery on the shoulder was not necessary, but the treating physician and the claimant thought it should be done. The court found that the administrative law judge had no role in choosing among reasonable treatment options. If the patient and the treating doctor want to follow a reasonable, although debatable, course of medical treatment, as the surgery was in that case, they may do so without interference by the employer or review by an administrative law judge. The case did not present an issue of whether Mr. Amos' shoulder problem and the need for surgery arose from a pre-existing condition, or whether a pre-existing condition in the shoulder was aggravated by the fall and necessitated the surgery.

I do not believe that due to his status as treating physician, Dr. Chow's opinion is entitled to any special deference on the issue of the causation for Claimant's back complaints. The facts and the holding in *Amos* were limited to issues of medical treatment, not legal causation. *Amos* presented no facts which required the administrative law judge, the Benefits Review Board or the Court of Appeals to indulge any presumption about the accuracy of the treating physician's views on causation of that claimant's shoulder injury, for it was clearly caused by his fall onto his shoulder.⁵ I do not regard the opinion of

⁵A similar issue about the appropriate deference owed to an opinion was raised, in a different context, in *United States v. Mead Corp.*, __ U.S. __, 121 S.Ct. 2164 (2001). There the U.S. Supreme Court considered whether a tariff classification ruling by the United States Customs Service was entitled to special judicial deference under *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), when it was not a product of notice-and-comment rulemaking. The Court declined to give the position of the Customs Service *Chevron* deference, even though the majority did not think that the agency's interpretation of the relevant statute was "outside the pale of any deference [whatsoever]." *Mead*, 121 S.Ct. at 2175. Due to the agency's specialized experience and the information available to the agency, the Court found the agency interpretation was entitled to some

Claimant's treating physician, Dr. Chow, on the subject of legal causation as conclusive.

I am also persuaded that it would be inappropriate to give controlling weight to Dr. Chow's opinion on causation by a well-reasoned decision from the Seventh Circuit, *Peabody Coal Co. v. McCandless*, 255 F.3d 465 (7th Cir. 2001), a black lung benefits case. That court thought it "irrational to prefer the opinion of the treating physician, who is often not a specialist, over the opinion of a nontreating specialist *solely* because one physician is the treating physician. *Id.* at 469 (quoting *Peabody Coal Co. v. Director, OWCP*, 972 F.2d 178, 180 (7th Cir. 1992)). The question to be determined by the administrative law judge turns on the explanatory power of the doctor's opinion, in the context of the medical record in the case, not on some status held by the doctor who is the source of the opinion. The reasoning employed in that decision is quite consistent with the decision of the U.S. Supreme Court in *Mead*, *supra* n.5, and should be applied here too.

Determining not to give controlling weight to the treating physician's opinion about causation opens the question of just what weight I should give to it. Other administrative law judges dealing with longshore claims in the Ninth Circuit have looked to Social Security decisions for guidance in determining how to evaluate differing opinions from medical experts. *See, e.g.*, Judge Burch's decision in *Brown v. National Steel and Shipbuilding Co.*, 34 BRBS 26, 32-33 (ALJ 1999). The Social Security regulations for evaluating physician opinions concerning disability are found at 20 C.F.R. § 404.1527(d). They are not directly applicable in a longshore case, but because *Amos* holds that "the same logic applies in cases involving industrial injuries," 153 F.3d at 1054, those regulations can provide a valuable framework to use when assessing the relative weight to be assign to conflicting medical opinions. The regulations require an adjudicator to consider much more than status, *i.e.*, whether the source of the opinion is only an examiner or is a treating doctor. They instruct the

weight under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). The Court listed several factors – including the degree of the agency's care in reaching its conclusion, its consistency in reaching the same conclusion under similar facts, the formality of the procedure used in reaching the conclusion (*i.e.*, whether it was the result of rulemaking), the agency's relative expertise, and the inherent persuasiveness of the agency's justification for its position – which should guide a court in determining whether to accept the agency position. *See Mead*, 121 S.Ct. at 2171-72 (citing *Skidmore*, 323 U.S. at 138-40). The agency's status as the entity charged with the implementation of the customs laws was not determinative *per se*. The agency position was only entitled to "respect proportional to its 'power to persuade'" 121 S.Ct. 2176.

Dr. Chow's opinion does not control, due to his status, any more than an agency position would control the outcome of litigation, due to its status. I do believe that I ought to carefully consider that opinion, and if I decline to accept it, articulate specific reasons to reject it, based in the record. His opinion is due no more respect than its inherent power to persuade commands, however.

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adjudicator to consider the length of the treatment relationship and the frequency of examinations, giving more weight to the opinion of a doctor who has treated the patient a number of times, long enough to obtain a longitudinal view of the functional impact of the relevant impairment 20 C.F.R. §404.1527(d)(2)(i). They also ask whether the source of the opinion is knowledgeable because he or she is focusing treatment on the impairment at issue and using specific examinations or laboratory tests to treat that condition, or is merely making passing comments on the condition while focusing care on some other body system, 20 C.F.R. § 404.1527(d)(2)(ii). Most importantly, those regulations require consideration of “supportability,” whether there is a supporting explanation for the opinion, whether medical signs and results of laboratory studies support the opinion, and whether it considers all the relevant medical evidence, 20 C.F.R. §404.1527(d)(3). The adjudicator is to consider whether the opinion is consistent with the record as a whole, 20 C.F. R. § 404.1527(d)(4), and whether it is expressed by a specialist in the area of his or her specialty, or is one from a general practitioner, 20 C.F.R. § 404.1527(d)(5). The final consideration is the extent to which the opinion is one from a source familiar with the specific disability program at issue and its evidentiary requirements, 20 C.F.R. §1527(d)(6).

As to the length of the treatment relationship and frequency of examination, Dr. Chow holds some advantage over Dr. Smith, for the former knew Claimant longer and treated him on a regular basis. Dr. Smith only examined Claimant on one occasion, long after the accident had occurred, but he did carefully review the entire medical record, so he did have a longitudinal context for the opinions he expressed. Both are specialists, not general practitioners, so that factor gives neither an advantage, and both were focusing on the area of their expertise, on Claimant’s back condition. The next three factors – supportability, consistency with the record, and the extent to which the opinion is from a source familiar with the disability program and its evidentiary requirements – however, weigh in Dr. Smith’s favor and lessen the importance of the other factors.

As to supportability and consistency with the record, Dr. Smith explained his opinion more persuasively on the issue of causation than Dr. Chow did. Dr. Smith expressed the view that following his foot injury, Claimant had become substantially “deconditioned,” *i.e.*, had lost his muscle tone and fitness over a two year period after the accident. Before the fall the rigorous nature of his work kept him in shape, which had kept the back conditions revealed on his MRI scans from being symptomatic before his fall. Dr. Smith explained:

Then [Mr. Becker] becomes deconditioned. He doesn’t work anymore for a period and he has situations that come about whereby he has to lift his six year old, 60-pound son and then he develops low back pain.

This is not unusual. People become deconditioned and then conditions that they had pre-existing become symptomatic over a period of time. It’s more related to

deconditioning than anything else.

Deposition of Dr. Smith dated February 8, 2001, at 23.

As will be explained more thoroughly below, this deconditioning ultimately caused Claimant's lumbar problems to become symptomatic.

Dr. Chow, on the other hand, offered three possible interrelated theories of causation. *See generally* Deposition of Dr. Chow dated February 7, 2001, at pp. 23-24. First, he believed that the fall which caused the injury to Claimant's foot could also transmit enough force to injure his spine. Second, he opined that Claimant's history of work as a carpenter for one year prior to the accident contributed to his symptoms and disability. Finally, Dr. Chow thought that Claimant's altered gait, resulting from his walking on crutches after the accident, contributed to his back symptoms. Each of Dr. Chow's theories of causation is plausible in the abstract, but I believe Dr. Smith gave good reasons to reject each, based on the medical record here. For a number of reasons, the record indicates to me that Claimant suffered an injury only to his foot on the day of the accident.

I have the emergency room records of Dr. Linda Jenks, the physician who treated and examined Claimant immediately after the accident. They confirm that (a) Claimant did not complain of low back pain (though he did complain of upper back and neck pain); (b) she specifically looked to see whether there was low back injury, and palpated Claimant's low back, which did not elicit any complaints of tenderness; and (c) she observed no evidence of abrasions or bruises on his low back. Deposition of Dr. Jenks dated October 25, 2000, at pp. 11-14, and Deposition Exhibit 2 at p. 3.

Second, Claimant contends that his back pain became more constant and pronounced as he became more mobile following two surgeries on his foot, which were done on April 19, 1997 and October 27, 1997. Yet between the date of the accident and April 1, 1999 – a period of two years – Claimant made over ninety trips to various physicians and physical therapists who kept contemporaneous records of those visits.⁶ They do not record that Claimant mentioned pain in his lower back. Claimant insists that he voiced such complaints, but I regard as more reliable the written records kept by the professional health care providers. Those records were not authored by a single person, but by multiple health care professionals. Viewed as a whole, they are better indicators of what he told his care givers. The absence of recorded low back complaints, in a negative sort of way, makes the canon of his treatment records internally consistent. Only upon his first visit to a pain management consultant, Dr. Oki, on July 8, 1999, did Mr. Becker fill out a pain diagram specifically illustrating lumbar discomfort radiating down the left leg. Even with this, Dr. Oki did not investigate his low back

⁶These include 22 visits to Dr. Oishi, 72 visits to physical therapist Pat Ariki, and one visit to Dr. Ronald Kienetz. *See* Deposition of Dr. Chow dated February 7, 2001, at 27-28.

complaint, but focused on his foot. I am unwilling to generalize from this that Claimant had made complaints of back pain earlier than July 8, 1999, and in all instances they went unrecorded. I find that improbable. I need not impute mendacity to Claimant to reject his belief that since the time of his fall, he had expressed to health care providers complaints of low back pain on a consistent basis.

The next factor, the extent to which the opinion is from a source familiar with the disability program and its evidentiary requirements, tips the balance in favor of Dr. Smith over Dr. Chow. While both doctors are experienced spinal specialists, Dr. Smith's focus in his practice on forensic medicine, Respondent's Exhibit N, at p. 39. Claimant disparages Dr. Smith as a surgeon who has not "performed an operation 'for a long time,'" Claimant's Amended Proposed Decision and Order at p. 11, but this fact is not significant to me in deciding whether Dr. Smith can render a credible opinion about the cause of Claimant's back injuries. That Dr. Smith now focuses on forensic work, and is shifting his practice to medical-legal testimony tends to bolster his opinion, for it indicates to me that he is more familiar with evidentiary requirements and has studied the record with an eye to discerning a theory consistent with the facts presented to him in the whole record. Dr. Smith held a distinct advantage over the treating physician, Dr. Chow, because he was able to devote the time to digest Mr. Becker's entire file. As Dr. Smith testified, "I see the whole picture, not just the one single event or one single complaint they're having. I get a chance to review all the records." Deposition of Dr. Smith dated February 8, 2001, at 9.⁷ Dr. Chow, by contrast, admitted that he had barely reviewed or not reviewed at all various medical records and depositions pertaining to the case, and conceded that a doctor who has looked at all the records in an orderly fashion has an advantage in determining the causation of a patient's back problems. Deposition of Dr. Chow dated February 7, 2001, at 13-17.⁸

Matters recorded in or absent from the medical record here badly damage Dr. Chow's theories of causation for Claimant's back injury. If he were correct, the back problem should have been more apparent at the time of the fall when the emergency room doctor specifically looked for evidence of back injury, and the pain from it should have elicited consistent complaints recorded by the medical providers attending to Mr. Becker in their contemporaneous records, and caused them to investigate further the source of the back pain, and to prescribe treatment, whether in the form of medicine or physical therapy, for persistent back symptoms. If the back problems were caused by awkward gait following the foot surgeries, the complaints should have surfaced and been most prominent right after

⁷Dr. Smith continues by noting that while treating physicians regularly see around forty patients per day, he will typically see four patients, allowing him to interview and review the file of a patient like Mr. Becker as long as he wants. *See* Deposition of Dr. Smith dated February 8, 2001, at 9.

⁸This is not meant to intimate that Dr. Chow is less competent than Dr. Smith. I merely find that Dr. Chow's primary role in this case was to treat Claimant's medical problems – not to determine the cause of those problems – and he allocated his time accordingly.

the surgeries, when the gait was most affected. The record does not bear these things out. Instead, the record as a whole is more consistent with Dr. Smith's theory of causation. The work as a carpenter was not causing additional micro-trauma worsening his condition, but was contributing to muscle strength and tone which kept his pre-existing condition from becoming symptomatic. It was after he stopped working that Claimant's back condition caused him significant problems.

2. Dr. Smith's opinion and its implications.

Once I have accepted the opinion of Dr. Robert Smith about the causation of the back problems, I must consider the implications of the testimony that Claimant's foot injury led to deconditioning of his spine, and the back symptoms he experienced.

Dr. Smith was the first physician to diagnose the Claimant's pre-existing spondylolisthesis. Report of Dr. Robert Smith dated June 27, 2000, at 10. Dr. Smith opined that Claimant had become "deconditioned," *i.e.*, lost his muscle tone and fitness over a two year period after the accident. Respondents's Ex. N, Deposition of Dr. Smith dated February 8, 2001, at pp. 21-23.

Based on Dr. Smith's testimony, I find that this deconditioning aggravated, accelerated or combined with the Claimant's pre-existing lumbar condition in such a way that Claimant should be compensated under the Act. Before the fall, Claimant was able to engage in the physically demanding job of a carpenter, despite his pars defect at the L4-5 level, a Grade I spondylolisthesis at L4-5, a subluxation of L4 on L5, marked bilateral L4-5 foraminal stenosis, a disc protrusion at L4-5, and mild degeneration of L5-S1. *Ibid.* While working, Claimant's muscles and ligaments were in condition and he was able to function, but this changed only when he became more sedentary after his injury, and became deconditioned. *Id.* at 23.

When an employment-related injury aggravates, accelerates, or combines with a pre-existing condition in any way, the entire resultant injury is compensable under the Act. *Independent Stevedore*, 357 F.2d at 815; *Port of Portland*, 932 F.2d at 839; *Rajotte v. General Dynamics Corp.*, 18 BRBS 85 (1986). According to the Ninth Circuit in *Port of Portland*:

This doctrine does not require that the employment injury interact with the underlying condition itself to produce some worsening of the underlying impairment The fact that part of [the claimant's] disability may have been due to a non-employment condition does not require him to prove that his disabilities combined in more than an additive way to warrant compensation for the resulting overall impairment.

Port of Portland, 932 F.2d at 839 (citations omitted).

This type of reasoning is commonly employed by state courts in workers' compensation cases. *See e.g., Carter v. Rockwood Insurance Co.*, 341 So.2d 595 (La App. 1977). *Carter* involved a worker who suffered debilitating knee injuries in a slip and fall accident while working at a restaurant as a waitress. She subsequently fell at home and fractured the femur in the same leg. The doctor in *Carter* attributed the severity of her fracture to the weakening of the bone due to the lack of normal use, which is similar to the testimony of Dr. Smith here. Crediting the doctor's opinion, the court found that the "post-accident complications, whether of a purely medical nature, or whether relating to subsequent off-the-job accidental injury, may be compensable if they are causally related to an on-the-job accident." *Id.* at 598. *See also*, A. Larson, Workers' Compensation Law § 10.06. Employing similar reasoning, I find that Claimant's lumbar problems are compensable. His back only became symptomatic while off-the-job, due to his on-the-job accident. The deconditioning of his lumbar spine occurred when the foot injury prevented him from being as active as he had been.

3. Scheduled vs. unscheduled injury

The Benefits Review Board ("Board") has held that where a claimant suffers two distinct injuries – one scheduled and the other unscheduled – arising from a single accident, he may be entitled to receive compensation under both the schedule and § 8(c)(21). What controls is whether claimant's condition is the natural consequence of his work-related injury or constitutes a separate and distinct injury. *See Frye v. Potomac Electric Power Co.*, 21 BRBS 194 (1988). In *Frye*, the claimant sought compensation under § 8(c)(21) because in addition to his initial ankle injury, he sustained a back injury, emotional impairments and chronic pain syndrome. In a matter of first impression, the Board held that a claimant could recover for the combined effect of his conditions if the unscheduled injuries were the "sequelae" of the scheduled injury, *i.e.*, they resulted from the natural progression of the injury which had occurred to the scheduled member. *Id.*

The holding in *Frye* applies here because Claimant's lumbar problems did not come into being nor were they made symptomatic by the trauma of his fall on April 7, 1997. Rather, they are the "sequelae" of his initial foot injury. Over time the foot injury caused him to become deconditioned, which in turn lead to the aggravation and acceleration of his pre-existing lumbar condition. Although it took "two steps" of causation rather than one,⁹ I find that Claimant's lumbar problems resulted from the natural progression of the foot injury and are therefore compensable with one award for the combined effects to his foot and his back under § 8(c)(21). Respondents argue the chain of causation was broken because Dr. Smith's testimony implies that the lumbar symptoms came on after Claimant lifted his six year old son. This is not an intervening cause sufficient to break the chain of causation, as would

⁹The first step is when the foot injury caused the deconditioning, and the second step is when the deconditioning caused the aggravated lumbar problems.

be the case if Claimant's lumbar symptoms surfaced only after some other trauma, such as an automobile accident, occurred after the work injury to the foot. It is completely normal for a father to lift his young child, and I consider it an ordinary activity of daily living. When sequelae arise from such quotidian activities, they are not the result of an intervening cause, and fall within the coverage of the Act. I also find that Dr. Smith does not squarely attribute Claimant's back symptoms to that lifting, but to the deconditioning. Respondents's Ex. N, Deposition of Dr. Smith dated February 8, 2001, at 23, lines 18-19.

In sum, then, Dr. Smith's testimony is the most persuasive, and dispositive in Claimant's favor. The back symptoms resulted naturally and unavoidably from the initial foot injuries.

B. Respondents' Provision of Medical Treatment for Claimant's Lumbar Problems

Once it has been established that Claimant's employment-related foot injury aggravated, accelerated and combined with his pre-existing low back condition to require back surgery, many of the other issues fall into place. One of them is whether Respondents are responsible to provide for the medical treatment of Claimant's lumbar condition.

Claimant underwent a surgical decompression and fusion at L4-5 on January 4, 2001. Dr. Chow has found that this procedure was necessary to treat the patient's back condition. Claimant's Exhibit 12, pp. 58-59, 66-67. At this point the *Amos* decision, as properly understood, does give rise to special deference to the decision of the patient and the opinion of his treating physician to preform the back surgery. "Although the employer is not required to pay for unreasonable and inappropriate treatment, when the patient is faced with two or more valid medical alternatives, it is the patient, in consultation with his own doctor, who has the right to chart his own destiny." *Amos*, 153 F.3d at 1054. The Respondents have not submitted evidence that the lumbar surgery was an unreasonable form of treatment, but deny it was related to the fall and the foot injuries. I find that this medical treatment was reasonable and appropriate under *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255, 257-58 (1984).

Medical care for a pre-existing injury is fully covered under § 7 of the Act even though it is indirectly work-related. See *Kelley v. Bureau of Nat. Affairs*, 20 BRBS 169, 172 (1988). When an employee requests the employer's authorization for treatment, the employer refuses the request, and the employee procures reasonable and necessary treatment on his own initiative, the employee is entitled to recover medical benefits under § 7(d). See *Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112, 113 (1996); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20, 23 (1989). Dr. Chow specifically requested authorization from Respondents for the back surgery in a letter dated November 17, 2000,

but Respondents refused to approve it. *See* Joint Prehearing Statement, at p. 3. Claimant eventually had that surgery in January 2001 on his own initiative, paid for by Claimant's private health carrier, HMSA. Respondents must bear the costs of that surgery.

C. Suitable Alternative Employment for Claimant

If the only injuries for which Respondents were responsible were the foot injuries, I would decide whether Respondents had met the burden of demonstrating there was suitable alternative employment available for Claimant at the time they terminated his compensation benefits in December 2000. I need not reach this matter, because the parties have stipulated that Claimant has not attained maximum medical improvement for his lumbar problems, and remains temporarily totally disabled. Thus, this vocational issue is not ripe for determination now.

D. Scheduled Payment for Loss of Use of the Left Foot

I must next determine whether Claimant has suffered a scheduled loss of use of the left foot under § 8(c)(4) of the Act.¹⁰

The medical evidence is undisputed and I find that Claimant has suffered a serious and permanently disabling injury to his left foot. As mentioned above, however, where a claimant's unscheduled injuries were the "sequelae" of the scheduled injury, a claimant recovers for the combined effect of all his conditions under § 8(c)(21). No scheduled injury is payable. *Frye*, 21 BRBS at 198.

E. Claimant's Entitlement to Interest, Costs and Attorney's Fees and Respondents' Request for Credit for Payments

¹⁰Section 8(c)(4) states in pertinent part:

Permanent partial disability: In case of disability partial in character but permanent in quality the compensation shall be 66 2/3 per centum of the average weekly wages, which shall be in addition to compensation for temporary total disability or temporary partial disability paid in accordance with subdivision (b) or subdivision (e) of this section respectively and shall be paid to the employee as follows:

(4) Foot lost, two hundred and five weeks' compensation.

In view of the foregoing findings, it is necessary to consider whether Claimant is entitled to interest under 28 U.S.C. § 1961, whether his attorney is entitled to costs and fees under § 28 of the Act, and whether Respondents are entitled to a credit toward an award of any further disability benefits.

1. Entitlement to interest

A plaintiff who recovers a judgment in a federal district court is entitled to interest on that money under 28 U.S.C. § 1961. A number of decisions have applied this statute to longshore cases. *See, e.g., Foundation Constructors v. Director, OWCP*, 950 F.2d 621, 625 (9th Cir. 1991); *Quave v. Progress Marine*, 912 F.2d 798, 800 (5th Cir. 1990); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 594 F.2d 986, 987 (4th Cir. 1979). In *Foundation Constructors*, the Ninth Circuit stated:

It is a truism that a dollar tomorrow is not worth as much as a dollar today. Allowing an employer to delay compensation payments interest-free would reduce the worth of such payments to the claimant, undermining the remedial intent of the Act. We believe that the Director's construction that interest may be required on past-due compensation is reasonable and consistent with the ends of the Act

Foundation Constructors, 950 F.2d at 625.

Claimant is entitled to interest on all past due payments, at the rate set in 28 U.S.C. § 1961. It accrues on each unpaid or underpaid installment of compensation benefits from the date compensation actually became due, until the date of actual payment.

2. Entitlement to attorney's fees

The parties disagree on whether § 28(a)¹¹ or § 28(b)¹² of the Act applies here. Claimant argues under

¹¹Section 28(a) of the Act provides:

If the employer or carrier declines to pay any compensation on or before the thirtieth day after receiving written notice of a claim for compensation having been filed from the deputy commissioner, on the ground that there is no liability for compensation within the provisions of this Act, and the person seeking benefits shall thereafter have utilized the services of an attorney at law in the successful prosecution of his claim, there shall be awarded, in addition to the award of compensation, in a compensation order, a reasonable attorney's fee against the employer or carrier in an amount approved by the deputy commissioner, Board, or court, as the case may be, which shall be paid directly

Armor v. Maryland Shipbuilding & Dry Dock Co., 19 BRBS 119, 121 (1986), that § 28(a) governs because § 28(b) only applies “when employer pays or tenders payment of compensation without an award, and the employee refuses to accept such payment or tender Respondents, on the other hand, argue that § 28(b) of the Act controls because they had voluntarily paid compensation, but a dispute arose with regard to additional compensation due to Claimant.

I reject Claimant’s contention that § 28(a) governs in this case. Respondents provided temporary total disability compensation and medical benefits to Claimant until December 14, 2000, at which point a controversy developed. Section 28(a) only covers situations where an employer flatly refuses to pay

by the employer or carrier to the attorney for the claimant in a lump sum after the compensation order becomes final.

¹²Section 28(b) of the Act states:

If the employer or carrier pays or tenders payment of compensation without an award pursuant to section 14(a) and (b) of this Act, and thereafter a controversy develops over the amount of additional compensation, if any, to which the employee may be entitled, the deputy commissioner or Board shall set the matter for an informal conference and following such conference the deputy commissioner or Board shall recommend in writing a disposition of the controversy. If the employer or carrier refuses to accept such written recommendation, within fourteen days after its receipt by them, they shall pay or tender to the employee in writing the additional compensation, if any, to which they believe the employee is entitled. If the employee refuses to accept such payment or tender of compensation, and thereafter utilizes the services of an attorney at law, and if the compensation thereafter awarded is greater than the amount paid or tendered by the employer or carrier, a reasonable attorney's fee based solely upon the difference between the amount awarded and the amount tendered or paid shall be awarded in addition to the amount of compensation. The foregoing sentence shall not apply if the controversy relates to degree or length of disability, and if the employer or carrier offers to submit the case for evaluation by physicians employed or selected by the Secretary, as authorized in Section 7(e) and offers to tender an amount of compensation based upon the degree or length of disability found by the independent medical report at such time as an evaluation of disability can be made. If the claimant is successful in review proceedings before the Board or court in any such case an award may be made in favor of the claimant and against the employer or carrier for a reasonable attorney's fee for claimant's counsel in accord with the above provisions. In all other cases any claim for legal services shall not be assessed against the employer or carrier.

benefits, and the employee engages a lawyer who undertakes a “successful prosecution” of the claim.

Instead, I believe that Section 28(b) of the Act controls. Section 28(b) applies when there is a controversy as to the nature and extent of the claimant’s disability. *Baker v. Todd Shipyards Corp.*, 12 BRBS 309 (1980). Section 28(b) does not authorize the payment of attorney’s fees for services performed by a claimant’s attorney unless the record shows that the employer refused to accept the written recommendations of the claims examiner following an informal conference. *Todd Shipyards v. Director, OWCP*, 950 F.2d 607 (9th Cir. 1991).

In the end, it does not matter whether Claimant’s fee application is governed by § 28(a) or § 28(b), for Claimant prevails either way, and the fee would be calculated in essentially the same way under either provision.

3. Benefits Due for Foot Injury/Credit for Payments

Finally, Respondents suggest in their supplemental brief that they have overpaid Claimant in the amount of \$44,317.41, and that they are entitled to a credit in this amount for an award of any further disability claimed from this injury. They already compensated Claimant at a rate of \$444.82 per week for 132.43 weeks, and maintain they should have only compensated him at that rate for 32.8 weeks.¹³

Respondents would have had a valid point had Claimant suffered only a scheduled injury to his left foot, but that is not the case here. The scheduled injury to his foot and the unscheduled injuries to his back merged into one unscheduled injury that is compensable under § 8(c)(21). *Frye*, 21 BRBS at 198. Claimant has not yet reached maximum medical improvement from the unscheduled injury. Joint Prehearing Statement of September 7, 2001, at 3. After he reaches that stage, it will become possible to assess whether there are any additional permanent impairments, and to locate suitable alternative employment for Claimant, by considering Claimant’s foot and back limitations, and any other relevant characteristics. Only then will Respondents duty to pay temporary total disability compensation cease.

The parties stipulated that Respondents paid Claimant’s temporary total disability compensation from the time of the accident until December 14, 2000. Joint Prehearing Statement of September 7, 2001, at 3. Respondents are therefore current in their temporary total disability payments until that date. As Claimant has not yet reached maximum medical improvement for the unscheduled

¹³According to the schedule enumerated in § 8(c)(4), a foot injury is compensable for 205 weeks. Respondents argue that this number should be multiplied by 16%, or the percentage of impairment of the foot determined by Dr. Kienetz, the independent medical examiner in this matter, which yields 32.8 weeks of payments as the amount due.

lower back injury, Claimants owe temporary total disability payments to Claimant for the time after December 14, 2000. They also owe interest on all unpaid installments.

No issue of liability for the twenty percent penalty imposed under § 14(f) of the Act has been raised, apparently because Respondents did file a timely notice of controversion on November 2, 1999.

V. ORDER

Based on the foregoing information, it is ORDERED that:

1. Respondents are liable to pay temporary total disability benefits to Claimant based on an average weekly wage of \$667.23. He has not yet attained maximum medical improvement;
2. Respondents shall pay interest on each unpaid installment of compensation from the date compensation actually became due until the date of actual payment. The rate of interest shall be that set in 28 U.S.C. § 1961, compounded annually as that statute requires;
3. Respondents are liable to provide medical care for Claimant's lumbar symptoms under § 7 of the Act, and to reimburse Claimant's private health carrier, HMSA, for medical treatment it provided for those symptoms. They remain liable for all reasonable and necessary medical expenses incurred in the future as a result of the April 8, 1997 accident for the left foot injury and for care of Claimant's lumbar spine;
4. Any petition of attorney's fees and costs must be prepared on a line item basis and comply with 20 C.F.R. § 702.132 in order to be considered. It must be filed within twenty days after service of this Order by the District Director. If a fee petition is filed by Claimant, any objection(s) by Respondents shall be stated on a line item basis; the objection(s) shall include the reason for the objection and any supporting explanation Respondents wish to offer. Objections shall be filed within ten days after the fee petition is deemed received, based on the rules for service of documents by U.S. mail. Items which are not the subject of an objection in the manner required will be treated as admitted, and will be allowed. The parties shall then meet and confer within 10 days, at an hour and place arranged by counsel for Claimant, in an effort to eliminate or settle the objections. Within 10 days after that meeting, for objections not resolved, counsel for Claimant may file a line item response dealing with the remaining objections. The response shall state the date the meeting of counsel took place.

5. All computation of benefits and other calculations which must be made to carry out this order are subject to verification and adjustment by the District Director.

A
William Dorsey
Administrative Law Judge